

UNITED STATES
v.
CHAS. PFIZER AND COMPANY, INC.

IBLA 70-152

Decided June 6, 1972

Request for clarification of Departmental decision.

Denied.

APPEARANCES: John R. Lonergan, for Chas. Pfizer and Company, Inc.; Charles F. Lawrence for the United States.

ORDER

On October 23, 1970, Chas. Pfizer and Company, Inc., filed a request for reconsideration and reclarification of the Departmental decision in Chas. B. Pfizer and Company, Inc. v. United States, 76 I.D. 331 (1969). ^{1/} Oral argument was held on June 30, 1971.

The decision, which involved the validity of four mining claims located for deposits of limestone, held that limestone consisting of at least 95% calcium magnesium carbonate is a chemical and metallurgical grade limestone which remains locatable under the mining law as an uncommon variety of stone. It also held that if a deposit of limestone consists of both a common and uncommon variety, the validity of the claim located for such a deposit after July 23, 1955, depends upon whether a valid discovery has been made only with respect to the uncommon variety and that the determination must be made Without any consideration of the value that the common variety may have.

It then remanded the case for a rehearing, as to each claim, to determine whether the chemical or metallurgical grade limestone can be marketed at a profit, the amount and nature of occurrence of the grade of limestone and the costs of mining it in the state in which it exists on the claims, and the degree of whiteness that is claimed

^{1/} A prior request for reconsideration had been denied on May 6, 1970.

to be a unique property of the limestone and whether this unique property is claimed for any limestone of less than chemical or metallurgical grade on the claims.

The decision did not discuss in detail, because the problem has not been raised, whether where an uncommon variety of limestone found on the claim could be downgraded by the admixture, of less desirable stone to a quality still sufficient to be classed as an uncommon variety and sold as such, the proceeds from such sales could be taken into account in determining whether a discovery had been made.

At the oral argument it developed that there was no conflict on this point. Both parties agreed that as long as the product sold from the claim constituted an uncommon variety it would be deemed and accounted for as an uncommon variety.

They also agreed that sales of a common variety of stone could not be added to those of an uncommon variety in determining whether there has been a discovery on the claim. Thus this aspect of the decision needs no exegesis.

However, in Its brief presented after the oral argument, the appellant contends that there are three issues remaining in need of clarification.

I. How to dispose of a deposit on a mining claim consisting of both common and uncommon varieties of stone. This issue is divided into two parts.

a. Whether a deposit on a claim which consists of blocks of uncommon and common variety which can be developed separately is to be considered in its entirety as a deposit of an uncommon variety and is locatable as a whole under the mining laws.

b. Whether a deposit on a claim which consists of blocks of common and uncommon varieties of stone and which is marketed in part by mixing common and uncommon stone to form a product classifiable as uncommon and in part as a product classifiable as a common variety is to be considered in its entirety as an uncommon variety, and thus locatable in its entirety under the mining laws.

II. Whether the decision properly stated the rule that the claimant must demonstrate a present profitable market for the uncommon variety of limestone in the claim in order to show that a discovery has been made on the claim.

III. Whether in a valid claim which encompasses blocks of both common and uncommon varieties of mineral the claimant may dispose of the common variety of stone prior to patent.

Considering first the second issue, we note, that the decision (at 336-337) merely referred to the requirement that it must be shown that there is a present profitable market for the material, even if it is proven to be an uncommon variety. It made no attempt to discuss the questions of temporary or permanent loss of market, or the reasonable expectation that a market will arise in the near or remote future or of reserves. The Department has expressed its view on these matters several times. United States v. Howard S. McKenzie, 4 IBLA 97 (1971), United States v. Wayne Winters d/b/a Piedras Del Sol Mining Company, 73 I.D. 193, 197 (1971); United States v. Paul M. Thomas, 78 I.D. 59, 9 (1971); United States v. Estate of Alvis F. Denison, 76 I.D. 2339 240 (1960); United States v. Theodore R. Jenkins, 75 I.D. 312, 318 (1968), United States v. Robert E. Anderson, Jr. et al., 74 I.D. 292 (1967).

The general principles expressed in these cases provide ample guidance for the hearing examiner in applying the law to such facts as may be developed at the hearing.

The other two issues raise problem that were not considered in the first decision because they were not evolved by the evidence or argument. Whether they will be of any materiality on the rehearing must depend on the evidence produced at it.

If the appellant deems it necessary to its case, it may present evidence relating to these issues at the rehearing and offer its discussion of the law in light of the evidence Presented. We do not believe it advisable to discuss such questions in the abstract, but prefer to have before us the facts of a particular case.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5: 35 F. 12081), the request for reconsideration and clarification is denied

and the case will be referred to a hearing examiner for hearing and decision as previously directed.

Martin Ritvo, Member

We concur:

James Day, ex officio member

Newton Frishberg, Chairman

Joan B. Thompson, Member

Frederick Fishman's separate views.

I believe that the majority opinion gives short shrift to appellant's contentions, and in large measure, ignores his request for clarification of earlier departmental rulings in the case.

Appellant had requested clarification of the denial of his first petition for reconsideration, issued on May 6, 1970 whether the obfuscation embodied in that denial was inadvertent is immaterial - the denial is worthy of being considered a classic riddle wrapped in an enigma.

The appellant requested clarification of the requirement that a showing be made "* * * that there is a present profitable market for the material." 76 I.D. 331 at 336. So far as I am aware, this was the first time that test has been employed in departmental decisions.

The majority opinion gives that request almost summary treatment, by merely referring the appellant to other departmental decisions relating to marketability.

I believe a full discussion is warranted, as set forth below.

By decision of December 29, 1969, 1/ in the above-entitled cause, A-31015, the Assistant Solicitor, Branch of Land Appeals, issued a decision remanding the case for a further hearing in accordance with his decision and for resubmission to his office for final decision at the conclusion of the hearing. 2/

1/ 76 I.D. 331.

2/ The case was remanded for the following reasons:

"To conclude on the issue of discovery we believe that there is insufficient evidence in the record upon which to base a finding as to whether or not the chemical or metallurgical grade limestone on the 4 claims in issue can be marketed at a profit. The evidence is deficient as to the amount and the nature of occurrence of this grade of limestone in the claims and as to the costs of mining it in the state in which it exists on the claims.

"The evidence is also insufficient for determining what degree of whiteness is claimed to be a unique property of the limestone and whether his unique property is claimed for any limestone of less than chemical or metallurgical grade on the claims. A fortiori, evidence is lacking as to whether limestone in that limited category is marketable at a profit.

"The case must therefore be remanded for a further hearing to develop additional evidence on these points as to the limestone on each claim. It is not sufficient for evidence to be developed simply for the 4 claims as a unit." [Emphasis in original.]

76 I.D. at 351-352.

By letter of May 6, 1970, the Assistant Solicitor, Branch of Land Appeals, denied Pfizer's request for reconsideration of that decision. On October 23, 1970, Pfizer (hereinafter called the appellant) again filed a request for clarification and reconsideration of the decision of December 29, 1969, which is reported at 76 I.D. 331. The document filed by the appellant on October 23, 1970, inter alia also requests clarification "of the intent of the Secretary created by the uncertain meaning of the expressions used in a summary denial dated May 6, 1970. * * * "

The gist of the petition for clarification and reconsideration relates to two portions of the decision. More specifically, the following language is questioned by the appellant:

In determining whether a discovery has been made on each of the four remaining claims, the critical consideration is whether a discovery has been made only of the uncommon variety of limestone on the claim. No consideration can be given to the value of the common variety of limestone that may exist on the claim even though that limestone may be marketable at a profit today. This is self-evident for since July 23, 1955, only an uncommon variety of limestone has been subject to mining location and it must stand on its own feet so far as discovery is concerned, unaided by its association with a common variety. It cannot ride piggyback, as it were, on the shoulders of a common variety. See United States v. Frank Melluzzo et al., 70 I.D. 184 (1963); cf. United States v. Mt. Pinos Development Corp., 75 I.D. 320 (1968). Thus the common limestone on the claims must be treated like the other worthless rock on the claims in evaluating whether a discovery has been made of the uncommon limestone.

76 I.D. at 348.

The appellant also challenges the statement in the decision of December 29, 1969 that "It must be shown that there is a present profitable market for the material." That statement appears in the following context:

Although the hearing examiner's decision in this case turned upon the question of the locatability of the material on appellant's claims, a showing of marketability of the material is as indispensable, if appellant is

to prevail, as the establishment of the fact that the material is not a common variety of stone. That is, if the material on the claims is not a common variety of stone, it must be shown that there is a present profitable market for the material. See United States v. Coleman, 390 U.S. 599 (1968); Foster v. Seaton, 271 P.2d 836 (D.C. Cir. 1959); United States v. Harold Ladd Pierce, 75 I.D. 255 (1968); United States v. Harold Ladd Pierce, id. 270; United States v. Warren E. Wurts and James E. Harmon, 76 I.D. 6 (1969). [Footnote omitted.]

76 I.D. at 336-337.

The appellant's objection to the "present profitable market" test is based, inter alia, upon the following:

In the Supreme Court's decision [United States v. Coleman, supra] the expressions are used "test of profitable marketability", "discovery of minerals that are valuable in an economic sense", "economically valuable" and "minerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation".

The requirement of a "present" profitable market is different and more onerous than the requirement of economic profitability. We urge reference back to the source of the prudent man rule in the Department in Castle v. Womble, [9 L.D. 455 (1894)] for the rule there announced. * * *

The expression "a present profitable market" connotes an immediate and unfilled portion of the market for the material, either raw or processed, at a particular time in question. "Economic profitability", as certainly visualized by the Supreme Court in its Coleman opinion, surely did not contemplate that periods of recession, of inactivity in the market place, and the like, would render void an unpatented mining claim containing material which would otherwise fit into that market and be actually put into and consumed in the market under normal or average conditions.

The rule as stated in the Decision leaves no room for reserves in claims not presently operated but which are awaiting their turn to be opened up and put into production.

The United States, through the Office of the General Counsel, Department of Agriculture (hereinafter called the appellee) urges that the decision of December 29, 1969, is correct in that it interdicts any consideration of common variety minerals in determining whether a discovery of valuable minerals has been made. The appellee suggests that the denial of the earlier request for reconsideration is clear and needs no clarification. Also the appellee defends the requirement of "a present profitable market" as follows:

1) Marketability. The requirement of a present profitable market" Is now embedded in the mining law. In one or another of its formulations it has been approved in each of the following decisions of this Department or of the courts:

Foster v. Seaton (Ct. of App., D.C., 1959) '71 F.2d 836, 838: the "requirement of present marketability. "

United States v. Coleman (S.Ct., 1968), 390 U.S. 599, 602: minerals for which "there is no demand."

United States v. Anderson (1967), 74 I.D. 292, 298: "existing market."

United States v. Melluzzo (1969), 76 I.D. 181. 183: "present demand."

United State v. Wurts (1969), 76 I.D. 6, 11: "present mineral value."

United States v. Boyle (1969), 76 I.D. 318, 323: "present demand."

United States v. Osborne (1970), 77 I.D. 83, 87: "presently marketed at a profit."

Appellant's objections to this rule are evidently unsound.

Pursuant to appellant's request for an opportunity to present oral argument, the same as granted for such purpose on June 30, 1971, before the Board en banc.

We first turn to consideration of the former Assistant Solicitor's letter of May 6, 1970, as to which the appellant desires clarification. hat letter recited as follows:

Dear Mr. Lonergan:

The petition of Chas. Pfizer & Co., Inc., for reconsideration of the Department's decision of December 29, 1969 (United States v. Chas. Pfizer & Co., Inc., 76 I.D. 331), has been carefully considered. We find the arguments presented in support of the petition to be, in large measure, based upon an assumption of facts which may or may not exist. It has been the policy of this Department to refrain from issuing rulings on hypothetical questions, and we believe that the question in this case as to precisely how much of the limestone found in the Largo Vista mining claims must be an uncommon variety of stone in order to make the deposits on the claims locatable under the mining laws can best be resolved after it is ascertained what, if any, part of the material found on the claims is an uncommon variety of stone and what are the economics of mining that material.

Insofar as the petition challenges the soundness of the Department's construction of the Act of July 23, 1955, we are not persuaded by the arguments advanced that the requirement that a deposit of material be shown to be valuable for its locatable minerals, without regard for the value of nonlocatable materials present, in order to be recognized as a valuable mineral deposit is either a new requirement imposed by the Department or an erroneous interpretation of the law. Indeed we believe that the petition does not accurately interpret the Department's decision.

The petition for reconsideration is therefore denied.

The first paragraph of the foregoing letter simply states that the Department is not disposed to make rulings of law in vacuo, but rather based upon a specific factual background. The ultimate sentence of the second paragraph of the letter, while, concededly somewhat enigmatic, controverts appellant's assertions that under the rules enunciated in 76 I.D. 331 it is not possible to consider in determining whether a discovery has been made: (1) low value gold (or any other low value inherently locatable mineral); (2) the aggregate values of differing inherently locatable minerals in a single claim (e.g. gold, silver, lead, zinc, antimony). Without passing upon appellant's other arguments we believe that the letter of May 6, 1970, together with the foregoing, amply delineate "the uncertain meaning of the expressions used in a summary denial dated May 6, 1970. * * *"

The first issue discussed in the oral argument held on June 30, 1971, was: in evaluating whether a discovery of a valuable mineral under the United States mining laws has been made, may cognizance be taken of the values to be derived from concededly "common varieties" of limestone imbedded in the same land (or deposit) as "uncommon" varieties of limestone?

At the oral argument, counsel for the appellant conceded 3/ that the value of minerals on a mining claim, admittedly of a common variety, could not be considered in determining whether a discovery had been made, where that mineral is disposed of separately from the "uncommon varieties".

However, the appellant and appellee agreed 4/ that where "uncommon" varieties of a particular mineral are mixed with "common" varieties of that mineral from the same claim, 5/ resulting in a product which would meet the "uncommon" variety test, the value of such aggregate product may be considered in determining whether a discovery has been made within the purview of the United States mining laws.

3/ He stated:

"The Mount Pinos Case [75 I.D. 320 (1968)] is not the type of thing we're talking about. I think we all agree on that that's gold and sand. You can't say that an insufficient quantity of gold can be economically profitable, because you're also going to sell the sand too, the sand being obviously a common variety mineral" (T. 21).

4/ T. 18, 21, 22, 60, 63, 64, 69, and 72.

5/ Although the transcript suggests that the mixing of the product must take place on the mining claim (T. 60, 63, 70, 772), I believe that the mixing could take place on a mill site, for which provision is made in 30 U.S.C. § 42 (1970). The appellee reluctantly agreed in the following dialogue:

"MR. FISHMAN: If you take uncommon from the claim, and you have, let's say a discrete bed of common on the claim, and you put them together off site to form what is an uncommon variety, your 95 percent to 99 percent or whatever. Is that disposal of the common variety permissible under the law in your judgment?

"MR. LAWRENCE: Well your [sic] supposing a case of extreme commercial hanky panky is what it amounts to. If all these things can be identified and they're removed for the purpose of getting eventually an uncommon variety off the claim, I suppose one would live with it certainly. I think your example departs from reality somewhat, That is not done, I cannot conceive very well people wanting to do that."

Appellant's Post Oral Argument brief (at pages 19 and 20) suggested the following standards:

1. A mineral deposit is a natural occurrence or accumulation of a useful mineral in sufficient extent and degree of concentration to invite exploitation.
2. A block is a division of a deposit bounded by arbitrary limits.
3. Where there are both blocks of common and blocks of uncommon varieties of a stone in the deposit of a claim, if the blocks of uncommon variety of stone in the deposit can be reasonably developed and mined without substantial inclusion of material from the common variety blocks, and such uncommon variety blocks can satisfy the prudent man rule of discovery as complemented by the marketability test, the entire deposit of the claim will be deemed a deposit of an uncommon variety, since the deposit possesses a property (the valuable uncommon variety present in it) giving the deposit a distinct and special value.
4. Where, within a deposit of stone in a claim, there are one or more blocks of such stone which, when considered alone, are an uncommon variety under the statute, and also one or more other blocks of such stone which are a common variety when so considered alone, and the blocks of uncommon variety of the claim may not alone be reasonably developed and mined so as to satisfy the prudent man rule of discovery as complemented by the marketability test, nevertheless the entire deposit within the claim will be deemed a deposit of an uncommon variety if the same property or properties giving such blocks of uncommon variety a distinct and special value within the meaning of the statute remain a significant factor in showing, and it can be shown, that production from a larger portion of the entire deposit of the claim, consisting of blended or mixed stone of both qualities from blocks of uncommon and blocks of common varieties, would satisfy the prudent man rule of discovery as complemented by the marketability test.

Apart from the question as to admixture of "common " and "uncommon" varieties resulting in an "uncommon" product, decided above, the appellant is raising the question whether in a valid claim, encompassing blocks of both common and uncommon varieties of mineral, the owner of the claim may dispose of the common varieties prior to patent. That question is not involved in these proceedings. There were two charges in the contest complaint: (1) a discovery of a

mineral deposit has not been made within the limits of each claim involved; and (2) the land is non-mineral in character. We are not disposed to rule on the question whether an owner of a valid mining claim may dispose of discrete common varieties of minerals thereon prior to patent, since such a ruling would be made in vacuo, and would have no impact on the issues at bar.

We now proceed to appellant's objection to the following rule enunciated in the decision of December 29, 1969:

It must be shown that there is a present profitable market for the material.

The appellant objects to this standard for the following reasons: (1) it construes present as meaning eo instante; (2) the standard takes no cognizance of marketplace fluctuations and should be broad enough to connote a market "within the reasonably foreseeable future * * * or one in the normal conditions of the industry" [Tr. 301; and (3) the standard leaves no room for reserves in claims not presently operated.

The "prudent man" concept, enunciated in Castle v. Womble, 19 L.D. 455, 457 (1894), and approved in Chrisman v. Miller, 197 U.S. 31 , 322 (1905)", is stated as follows:

* * * [W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. [Emphasis supplied.]

The Department in United States v. Theodore R. Jenkins, 75 I.D. 312 (1968), construed the prudent man rule as follows:

The test is not whether there is an operating profitable mine, or whether a prudent man at some time in the future under more favorable circumstances might expect to develop a profitable mine, but whether under the circumstances known at the time a profitable mine might be expected to be developed. This expectation must be based upon present considerations as to the value of the deposit as determined by the extent of salable mineral within it, and the market price for the

mineral, and by comparing the expected costs of the mining operation, (Footnote omitted.) [Emphasis in original.]

75 I.D. at 318.

In United States v. Estate of Alvis F. Denison, 76 I.D. 233, 240 (1969), the Department construed Jenkins as follows:

As the Jenkins case, supra, further indicates the expectation of future remunerative market prices must be based upon rational considerations, including normal market ups and downs, and not upon conjectures and speculation as to possible sharp increases in market prices due to unpredictable changes in world political and economic conditions, or to a Government subsidy, or to the unforeseen lowering of costs because of dramatic technological breakthrough. Thus, the expectation of future profitability under the prudent man test must be based upon present economic circumstances known then and not upon mere speculation as to possible substantial changes in the market place.

In essence, a mining claimant, to sustain the validity of his claim in a mining contest (after the Government has made a prima facie case of invalidity), must show by a preponderance of the evidence that there is a reasonable prospect that he can mine, remove, and market the mineral at a profit. See United States v. Robert E. Anderson, Jr., et al., 74 I.D. 2972 (1967); United States v. Michael Batesel, Muriel Batesel et al., Nevada Contest Nos. 062008, 062009-1 and 2, and 062012 (August 6, 1969).

The Department has recognized that a reasonable prospect of success "does not mean a sure thing." United States v. C. B. Myers et al., 74 I.D. 388, 390 (1967). Converse v. Udall, 399 F.2d 616, 623 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969), confirms this conclusion by approving the standard that "the nucleus of value which sustains a discovery must be such that with actual mining operations under proper management a profitable venture may reasonably be expected to result." [Emphasis supplied.]

In United States v. Coleman, 390 U.S. 599, 603 (1968), the Supreme Court explicitly recognized the marketability standard as simply a refinement of the prudent man rule, stating:

Finally, we think that the Court of Appeals' objection to the marketability test on the ground

that it involves the imposition of a different and more onerous standard on claims for minerals of widespread occurrence than for rarer minerals which have generally been dealt with under the prudent-man test is unwarranted. As we have pointed out above, the prudent-man test and the marketability test are not distinct standards, but are complementary in that the latter is a refinement of the former. While it is true that the marketability test is usually the critical factor in cases involving nonmetallic minerals of widespread occurrence, this is accounted for by the perfectly natural reason that precious metals which are in small supply and for which there is a great demand, sell at a price so high as to leave little room for doubt that they can be extracted and marketed at a profit.

It is noteworthy that the Government stated in the brief 6/ filed by the Secretary in the rehearing held in Coleman v United States before the Court of Appeals for the Ninth Circuit:

The Coleman opinion states several times that the Department has imposed an 'absolute requirement of proof of present marketability at a profit' (or words to that effect) as the standard of discovery for minerals of widespread occurrence. If the court means that the Department has required a showing that an actual profitable marketing operation was in existence on the critical date, the court has misread the Department's decisions. All that the Department has required has been a showing of facts from which the conclusion could reasonably be drawn that a profitable mining operation could have been conducted on the pertinent date, not that such an operation was actually being conducted. [Emphasis supplied.]

6/ Supplemental and Replacement Brief and Appendix for the United States, Appellee, and Brief and Appendix for Stewart L. Udall, Secretary of the Interior, Appellee and Counterclaim Defendant at 58.

The application of the marketability test to minerals not inherently valuable is not a novel doctrine. In United States v. C.E. Strauss et al., 59 I.D. 129, 138 (1945), the Department stated:

Whether particular deposits of these and other mineral substances of wide occurrence are valuable mineral deposits within the contemplation of the mining laws and whether the lands containing them are therefore subject to location and purchase under the mining laws are questions of fact, held to depend upon the marketability of the deposit. The rule long laid down by both the courts and the Department requires that to justify his possession the mineral locator or applicant must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed, and disposed of at a profit. [Emphasis in original.] Ickes v. Underwood et al., 78 App. D.C. 396, 141 F. (2d) 546 (1944); opinion of Acting Solicitor, 54 I.D. 294 (1933); Layman v. Ellis, 52 L.D. 714 (1929). In Big Pine Mining Corp., 53 I.D. 410, 412 (1931), the syllabus said:

Lands containing limestone or other minerals, which under the conditions shown in the particular case cannot probably be successfully mined and marketed, are not valuable because of their mineral content, nor subject to location under the mining law. [Last emphasis supplied.]

There is a constant thread in these decisions. The "reasonable prospect of success" of Castle v. Womble is the progenitor of the concept that to sustain the validity of a mining claim, it must be established that the mineral can "probably be successfully mined and marketed." However, in some cases it is suggested that in the absence of actual sales of the mineral, a presumption of non-marketability arises. United States v. Neil Stewart, 5 IBLA 39, 52 (February 28, 1972), 79 I.D. 27, see 9 ARIZ. L. REV. 70, 75 (1967); cf. 39 U. COLO. L. REV. 418 (1967).

Our attention has been directed by the appellee to Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1971) on this issue. Barrows enunciates the following:

Actual successful exploitation of a mining claim is not required to satisfy the "prudent-man test." See United States v. Coleman, 390 U.S. 599, 602 (1968); United States v. Anderson, 74 I.D. 292, 298 (1967). * * *

We agree that a claimant's ability to meet the "marketability test" cannot be made to depend on the extent of the market not already preempted by established operators. * * *

Nor can we accept Appellant's argument that the "prudent-man test" should be deemed satisfied if an Increased market and the depletion of better quality reserves are reasonably to be anticipated. The "marketability test" requires claimed materials to possess value as of the time of their discovery. Locations based on speculation that there may at some future date be a market for the discovered material cannot be sustained. What is required is that there be, at the time of discovery, a market for the discovered material that is sufficiently profitable to attract the efforts of a person of ordinary prudence.

We believe that the 9th Circuit decision in Barrows can be harmonized with previous holdings of the Department. The first two quoted paragraphs are fully consonant with the holding that:

. . . although In the case of perlite, a mining claimant, in order to obtain a patent, need not necessarily show that there is an existing market for the product of his claim, such a claimant must show that he is justified in his belief that he can dispose of the product of his claim in the existing market at a profit. [Footnote omitted]

United States v. Robert E. Anderson, Jr., et al., *supra*, at 298.

Concededly, the first sentence of the third quoted paragraph of Barrows, standing alone, may seem dissonant with our holding. However, in the context of that case, it is not, since the proposition it stands for is that one cannot project on July 23, 1955, a market in 1960. United States v. E. A. Barrows and Esther Barrows, 76 I.D. 299, 306, 312 (1969).

Moreover, some measure of clarification of the 9th Circuit's decision in Barrows is afforded by its decision of March 13, 1972, in Verrue v. United States of America, Secretary of the Interior, No. 71-1423, involving a sand and gravel placer location, located on March 7, 1946 and a withdrawal of the land from mining on February 10, 1948.

In Verrue, the court stated:

The government presented three witness@s, none of whom were in the Phoenix area from 1946 to 1948; nor did anyone of them have personal knowledge of the sand and gravel market during that time. Since the crucial issue is the "marketability" of the sand and gravel during the 1946-48 period, their testimony sheds no light on that issue.

On the other hand, the appellee presented three witnesses, besides himself, all of whom testified directly as to the "marketability" of sand and gravel in the immediate vicinity of the Sandy No. 2 claim during the 1946-48 period. This testimony was clearly competent to establish the existance [sic] of a market for the material present on the claim.

It appears that the Secretary's decision was based soley [sic] on his findings that there were no sales of sand and gravel at a profit from the claim and that there was evidence of an abundance of material in the area other than on the Sandy No. 2 claim, despite the uncontradicted evidence introduced by appellee that the material on Sandy No. 2 was marketable at a profit during the 1946-48 period. In determining marketability, evidence of sales is only one factor to be considered in the application of the prudent-man and marketability tests. See Coleman, supra. In our opinion this lack of evidence as to sales and the fact that there was other material available does not constitute the substantial evidence required to support the conclusion of the Secretary, when, as here, there is positive evidence in the record of marketability. [Footnote omitted.]

Verrue stands for the proposition that where " * * * there is positive evidence of marketability * * * " the absence of sales of the mineral and the existence of an abundance of material in the area do not constitute substantial evidence negating marketability. Verrue does not vitiate the requirement of marketability, it simply broadens the kind of evidence that may be utilized to establish it.

We accept the proposition that " * * * the prudent-man test should be deemed satisfied if an increased market and depletion of better quality reserves are reasonably to be anticipated" within a tight time frame, but not necessarily eo instante. The thrust of the third quoted paragraph of the 9th Circuit's decision in Barrows is as follows: At the time of the claimed discovery there must either be a known market for the minerals or the known conditions must be such as to reasonably engender the belief that the minerals will have value, sufficiently profitable to attract the efforts of a person of ordinary prudence, within the near future. As Denison, supra, clearly shows, cognizance may be taken of "normal market ups and downs." Insofar as "reserves" may enter into consideration of the case at bar, we reiterate the principle set forth in Anderson, supra, at 303 that:

Justification exists only for holding valid those claims which would supply contestees with the deposits necessary to carry on an operation of the size they contemplate for a reasonable period of time, for in a hard economic sense only those deposits have a reasonable prospect of a market.

Cf. 43 CFR 3711.1(b) (1970). We have not attempted to fix definitive time limits herein, since such an attempt would be procrustean and would preclude proper consideration of each case on its particular facts.

I would grant the petition for reconsideration and clarification.

Frederick Fishman, Member

I concur:

Anne Poindexter Lewis, Member

